

34

MAR 19 1943

CHARLES ELWOOD CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. **838**...

R. A. BLOUNT, HEARST B. BLOUNT, LONNIE FLINN and
EUNICE SIMPSON,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit
and
BRIEF IN SUPPORT.

LOUIS H. BREUER,
Rolla, Missouri,
Attorney for Petitioners.

SAMUEL RICHESON,
Potosi, Missouri,
HARRY O. SMITH,
722 Chestnut Street,
St. Louis, Missouri,
Of Counsel for Petitioners.



INDEX.

	Page
Petition for writ of certiorari.....	1-10
Prayer for writ.....	1
Opinions below.....	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	4
Specification of errors to be urged.....	6
Reasons for granting the writ.....	7
Conclusion	10
Brief in support.....	11-23
I. The terms "employer" and "employee," as used in the National Labor Relations Act, should be construed in their usual and long-established sense	11
II. The decision of the court below ignores the fact that the right of control over the manner in which work is performed is an inherent element in col- lective bargaining	14
III. The decision of the court below misinterprets the decisions of the Missouri courts in <i>Woodruff v.</i> <i>Superior Mineral Co.</i> , 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743, and fails to hold that under the Mis- souri Mining Act the miners are independent con- tractors and that such status under the law of the State of Missouri is controlling on the Board.....	16
IV. The decision of the court below fails to take into account the fact that the Board's order (1) places the petitioners in the position of being required	

to violate their contracts with the miners under the Missouri Mining Act, and (2) denies the liberty of contracting to assume relationships which do not contain the elements of control inherent in the employer-employee relationship—all of which is in violation of the Fifth Amendment to the Constitution of the United States.....	20
Conclusion	23
Appendix A. Sec. 2 (2) and (3) of the National Labor Relations Act.....	25
Appendix B. Secs. 13593, 13594, 13595, 13596, 13597, R. S. of Missouri 1929 (Secs. 14783, 14784, 14785, 14786, 14787, R. S. of Missouri 1939).....	26-30

Cases Cited.

Bingo Mining Co. v. Felton, 78 Mo. App. 210, 214-15..	14
Bowman v. Pace, 119 F. (2d) 858.....	13
Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449, 36 S. Ct. 403, 60 L. ed. 735.....	12
Columbia River Packers Association v. Hinton, 315 U. S. 143, 62 S. Ct. 520, 86 L. Ed. 750.....	8, 11, 15
Coul v. Peek Dry Goods Co., 326 Mo. 870, 32 S. W. (2d) 758	16
Dayton & Mich. R. Co. v. Commissioner, 4 Cir., 112 F. (2d) 627, 630.....	20
Hull v. Philadelphia & Reading Railway Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. Ed. 670.....	8, 12
Jones v. Goodson, 121 F. (2d) 176, 179.....	12
Maltz v. Jackoway-Katz Cap Co., 336 Mo. 1000, 82 S. W. (2d) 909, 912.....	16
Metcalf v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384.....	8

Metropolitan Life Ins. Co. v. United States, 6 Cir., 107 F. (2d) 311, certiorari denied 310 U. S. 630, 60 S. Ct. 978, 84 L. ed. 1400.....	20
Old Colony R. Co. v. Commissioner, 284 U. S. 552, 52 S. Ct. 211, 76 L. ed. 484.....	12
Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84, 35 S. Ct. 491, 59 L. ed. 849.....	12
Rutherford v. Tobin Quarries, 336 Mo. 1171, 82 S. W. (2d) 918.....	20
Singer Manufacturing Company v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 444.....	12
Tyler v. United States, 281 U. S. 497, 501, 50 S. Ct. 358, 74 L. ed. 991.....	20
United States v. Stewart, 311 U. S. 60, 61 S. Ct. 102, 85 L. Ed. 40.....	8, 12
Woodruff v. Superior Mineral Co., 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743.....	9, 13, 16, 17, 18, 19
Wright v. Mountain Trust Bank, 300 U. S. 400, 57 S. Ct. 566, 81 L. ed. 736.....	22

Statutes Cited.

Constitution of the United States, Fifth Amend- ment	7, 10, 20, 22
Fair Labor Standards Act, 29 U. S. C. A., Sec. 201 et seq.	12, 13
Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A., Sec. 51 et seq.	12
Federal Social Security Act, 42 U. S. C. A., Sec. 1001 et seq.	12
Judicial Code, Sec. 240 (a), as amended [28 U. S. C. A., Sec. 347 (a)]	2

Mining Act of the State of Missouri (R. S. Mo. 1929,	
Secs. 13593-97; R. S. Mo. 1939, Secs.	
14783-87)	3, 5, 9, 13, 21
Sec. 13593 (Sec. 14783)	5, 26
Sec. 13594 (Sec. 14784)	27
Sec. 13595 (Sec. 14785)	28
Sec. 13596 (Sec. 14786)	29
Sec. 13597 (Sec. 14787)	30
National Labor Relations Act (49 Stat. 449 et seq., 29	
U. S. C. A., Sec. 151 et seq.)	2, 7, 8
Sec. 2 (2) and (3), 29 U. S. C. A. 152	
(2) (3)	2, 3, 7, 8, 11, 25
Sec. 8 (5), 29 U. S. C. A. 158 (5)	3, 4, 11
Sec. 9 (a), 29 U. S. C. A. 159 (a)	3, 4
Norris-LaGuardia Act, 47 Stat. 73	11, 15
Revised Statutes of Missouri 1929 and 1939:	
Sec. 3308 (a)—1929; Sec. 3698 (a)—1939	16
Sec. 13593—1929; Sec. 14783—1939	5, 26
Sec. 13594—1929; Sec. 14784—1939	27
Sec. 13595—1929; Sec. 14785—1939	28
Sec. 13596—1929; Sec. 14786—1939	29
Sec. 13597—1929; Sec. 14787—1939	30

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No.

**R. A. BLOUNT, HEARST B. BLOUNT, LONNIE FLINN and
EUNICE SIMPSON,**
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

**To the United States Circuit Court of Appeals for
the Eighth Circuit.**

R. A. Blount, Hearst B. Blount, Lonnie Flinn and Eunice Simpson, the petitioners, respectfully pray that a writ of certiorari issue to review the judgment and decree of the Circuit Court of Appeals for the Eighth Circuit (R. 561) entered in the above cause on December 24, 1942, enforcing a decision and order of the National Labor Relations Board entered on December 16, 1941 (R. 523). The Board found that the miners and haulers engaged in mining and hauling barite or tiff on and from the petitioners' property in Washington County, Missouri, are petitioners' "em-

ployees" within the meaning of that term as used in the National Labor Relations Act (49 Stat. 449 et seq., 29 U. S. C. A., Sec. 151 et seq.), and that the petitioners refused to bargain collectively with International Union of Mine, Mill and Smelter Workers, Local 113, affiliated with the C. I. O. (hereinafter referred to as "union") as the representative of said miners and haulers in violation of Section 8 (5) of said Act (49 Stat. 452, 29 U. S. C. A. 158). The Board ordered the petitioners to bargain with the union.

OPINIONS BELOW.

The decision and order of the National Labor Relations Board (R. 523) is reported in 37 N. L. R. B. 662. The opinion of the Circuit Court of Appeals (R. 545) and the dissenting opinion of Judge Riddick (R. 553) are reported in 131 Fed. (2d) 585.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended [28 U. S. C. A., Sec. 347 (a)]. The opinion of the Circuit Court of Appeals was filed on November 4, 1942, and judgment was entered on December 24, 1942 (R. 561). Petition for rehearing was denied on November 27, 1942 (R. 561).

QUESTIONS PRESENTED.

1. Did Congress intend that the coverage of the National Labor Relations Act should extend to persons who are not "employees" within the meaning of that term at common law?
2. Are the miners and haulers, over whom the petitioners have no right of control as to how and when they perform their work, "employees" within the meaning of Section 2 (3) of the National Labor Relations Act [29 U. S. C. A.,

Sec. 152 (3)], and are the petitioners "employers" within the meaning of Section 2 (2) of said act [29 U. S. C. A., Sec. 152 (2)]?

3. Does the conclusion of the Board as to the existence of the employer-employee relationship, based upon findings of fact, some of which are not supported by the evidence and others showing no control in the petitioners over how and when the work is performed, form the basis of a valid and enforceable order?

4. Is the status of the miners as independent contractors for a definite term under their contract with the petitioners as contained in the Mining Act of the State of Missouri (R. S. Mo. 1929, Secs. 13593-97),¹ as interpreted by the highest courts of Missouri, binding and controlling on the Board?

5. Is the status of the miners and haulers as independent contractors under the law of the State of Missouri binding and controlling on the Board?

6. Is the application of the National Labor Relations Act to independent persons whose occupational enterprise is not subject to control as to time and manner of performance, and who have a statutory right to continue their enterprise for a definite period of time, an unreasonable interference with the obligations and liberty of contract in violation of the Fifth Amendment to the Constitution of the United States?

STATUTE INVOLVED.

The statute involved is the National Labor Relations Act, approved July 5, 1935, 49 Stat. 449 et seq., 29 U. S. C. A., Sec. 151 et seq., particularly Sections 2 (2) and (3), 8 (5) and 9 (a) of said Act, 29 U. S. C. A., Sections 152 (2)

¹ R. S. Mo. 1939, Secs. 14783-87.

and (3), 158 (5) and 159 (a). These sections of the National Labor Relations Act are set forth in Appendix A, *infra*, p. 25.

STATEMENT.

The petitioners are tenants in common of approximately 640 acres of land known as the "Paw Paw Patch," located near Richwoods, Washington County, Missouri. These lands are managed for the petitioners by the petitioner, R. A. Blount, who collects the royalties on the barite or tiff produced therefrom and accounts to his cotenants for their shares of the royalty. Petitioner R. A. Blount also purchases individually some of the tiff mined and hauled from said property. Royalties on tiff produced from the property, whether purchased by R. A. Blount or others, are divided equally among the petitioners.

Tiff is mined on and hauled from said property to purchasers by from seventy-five to 100 miners and haulers. These mining operations are conducted exclusively by hand methods, consisting in the main of the sinking of shallow shafts and the removal of the ore by means of hand shovels and windlasses. In these operations the miners furnish all their own tools and equipment.

A miner first obtains permission from petitioners to mine on their said property. After obtaining such permission the miners do their own prospecting, sink their shafts at locations selected by themselves, and generally work individually or in small groups in these and subsequent mining operations. The petitioners give the miners no orders or instructions as to where to work or how to work, or how much tiff they should mine, or when to start or quit work.

Permits for the hauling of tiff from said property are given by the petitioners to persons who own their own trucks and use them for this purpose.

[The foregoing facts appear in a stipulation between the Board and the petitioners (R. 411).]

The relationship between the miners and the petitioners is regulated by the Mining Act of Missouri (R. S. Mo. 1929, Sections 13593-97), and in particular by sections 13594-97 thereof, since the petitioners did not post notices containing the terms of the contract as provided in section 13593 (R. 414). These sections of the Missouri statutes are set forth in Appendix B, *infra*, pp. 26-30. Under these sections, the petitioners not having posted notices containing the terms of a contract, each miner has the statutory right to mine on the property for a term of three years, provided that he does not discontinue mining for as long as ten consecutive days, excluding Sundays, in any calendar month. The petitioners have an option to purchase tiff mined on their property at the highest market price.

The miners can change their haulers and frequently do so in order to secure haulers who will perform favors for them (R. 34-5, 130, 215, 298, 304-5), and the petitioners have never made any effort to interfere with a miner in changing his hauler (R. 34-5, 298-99, 337). The miners and haulers do not spend all their time working on the petitioners' property, but they have been free, subject only to conditions of the aforesaid Missouri statutes, to mine and haul tiff from other property not under the petitioners' control and to engage in other enterprises without objection from the petitioners (R. 76, 77, 123, 86, 266-67, 271, 283, 297, 309, 326).

R. A. Blount, the petitioners' agent for the collection of royalties, had visited the petitioners' said property (which is located twenty miles from his home and place of business) only once during the five years preceding the hearing in this case (R. 33). There is no evidence that the petitioners or any agent ever visited the property on any other occasion, or that the work of the miners and haulers is

supervised in any respect. The only requirement which R. A. Blount makes when buying tiff on his own behalf, and not as agent for the petitioners, is that it be clean and dry (R. 40, 334). No record is kept by the petitioners as to the production of any miner or hauler (R. 71-72).

The Board entered its order directing the petitioners to bargain collectively with the union as representative of the miners and haulers and petitioned the Circuit Court of Appeals for enforcement. The Circuit Court of Appeals enforced the order. Judge Riddick filed a dissenting opinion.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In not holding that the terms "employer" and "employee," as used in the National Labor Relations Act, are to be interpreted in their common-law sense, there being nothing in said act or its legislative history indicating that Congress intended that the Board should go beyond the common-law concepts in determining whether the employer-employee relationship exists.

(2) In not holding that the findings upon which the Board bases its conclusion that the miners and haulers are employees are immaterial to that issue, even if supported by the evidence, since these findings show no right of control in the petitioners over the miners and haulers.

(3) In holding that the Board's findings and conclusion that the miners and haulers are petitioners' employees within the meaning of the National Labor Relations Act are supported by material and substantial evidence.

(4) In not holding that under the Missouri Mining Statutes, as interpreted by the Missouri courts, the miners are independent contractors.

(5) In not holding that the relationship between the petitioners and the miners and haulers under the law of the State of Missouri is binding and controlling upon the Board.

(6) In requiring the petitioners to exercise the functions of "employer" (by collective bargaining), the exercise of which would be in violation of the Mining Act of Missouri.

(7) In not holding that the enforcement of the Board's order would constitute an unreasonable interference with the obligations of existing contracts between the petitioners and the miners, in violation of the Fifth Amendment to the Constitution.

(8) In not denying enforcement of the Board's order.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below involves important questions of national interest which have not been, but should be, settled by this Court. The principal question involved, upon which there were divergent views in the court below, is whether the National Labor Relations Act requires the petitioners to engage in collective bargaining with a union representing persons over whom the petitioners have no right of control as to how and when they carry on the enterprise in which they are engaged. It is important that this Court resolve this question since the decision of the court below has placed in doubt the status under the National Labor Relations Act of numerous independent contractors throughout the United States. The decision therefore vitally affects the administration of said act and is one of great public interest and importance.

2. The decision is in conflict with the provisions of the act.

(a) There is no indication in section 2 (2) and (3) of

the act,² or in any other section, that Congress intended that the coverage of the act should extend beyond the employer-employee relationship as recognized at common law, and the legislative history of the act indicates no congressional intention to apply the act to any controversy that does not have the common-law relationship of employer-employee as its foundation.

(b) The decision ignores a cardinal principle of statutory construction: that it will be presumed that the terms used in Acts of Congress were used in their usual and well-settled sense, unless Congress has expressed a contrary intention. **United States v. Stewart**, 311 U. S. 60, 61 S. Ct. 102, 85 L. Ed. 40.

(c) The decision, we believe, ignores controlling decisions of this Court holding that the term "employee," when used in an Act of Congress, means, in the absence of expressed congressional intention to the contrary, a person who is subject to the right of control in another as to the manner and means by which his work is accomplished, as well as the result to be accomplished. **Hull v. Philadelphia & Reading Railway Co.**, 252 U. S. 475, 40 S. Ct. 358, 64 L. Ed. 670; **Metcalf v. Mitchell**, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384.

3. The decision ignores the fact that the right of control over the manner in which work is performed is inherent in collective bargaining. In failing to recognize this fundamental fact we believe that the decision conflicts with the decision of this Court in **Columbia River Packers Association v. Hinton**, 315 U. S. 143, 62 S. Ct. 520, 86 L. Ed. 750.

4. The decision ignores the fact that the Board's conclusion that the haulers and miners are employees is based on findings of fact which are not material to that issue,

² Set forth in Appendix A, *infra*, p. 25.

namely, (1) that petitioner R. A. Blount arranges for the disposition of the tiff after it has been mined, (2) that the petitioners "operate" their property "for the purpose of obtaining a money income from the mining and sale of the tiff located there," (3) that "the miners and haulers engaged in the manual labor of mining and hauling the respondents' tiff, and receive therefor particularly small earnings," and (4) that the miners and haulers have joined a labor organization (R. 525-7).

5. The decision ignores the fact that the Board's findings, (1) that the permits to mine are revocable at will, and (2) that in effect the miners have no property interest in the tiff mined, are in direct conflict with the rights of the miners under the Missouri Mining Act.³

6. The decision misinterprets the decisions of the Missouri courts in **Woodruff v. Superior Mineral Co.**, 230 Mo. App. 616, 70 S. W. (2d) 1104, certiorari quashed, 337 Mo. 718, 85 S. W. (2d) 743, and fails to hold that under the Missouri Mining Act the miners are independent contractors. The decision also ignores the fact that under the law of the State of Missouri the right of control over the manner in which work is performed, as distinguished from control over the result, is an essential element in the employer-employee relationship. We, therefore, submit that the status of the miners and haulers under the law of the State of Missouri is controlling on the Board.

7. The decision fails to take into account the fact that the Board's order (1) requires the petitioners to violate their contract with the miners under the Missouri Mining Act, and (2) denies to persons the liberty to contract to assume relationships which do not contain elements of control inherent in the employer-employee relationship. This,

³ Set forth in Appendix B. *infra*, pages 26-30.

we submit, is in violation of the Fifth Amendment to the Constitution of the United States.

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this petition for certiorari should be granted.

LOUIS H. BREUER,
Attorney for Petitioners.

SAMUEL RICHESON,
HARRY O. SMITH,
Of Counsel for Petitioners.

